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WILLKIE FARR & GALLAGHER

July 9, 2001

Sheryl Todd
Accounting Policy Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

96-237

Re: Cellular Telecommunications & Internet Association CC Docket 96-45

Dear Ms. Todd:

Please find attached a diskette copy of Reply Comments of The Cellular Telecommunications & Internet Association, filed today in the above-referenced docket. The diskette is formatted in an IBM compatible form using Word for Windows software and is being submitted in "read only" mode.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Jeneba Ghatt

Jeneba Ghatt

Enclosure: diskette

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its Reply Comments in response to the above-captioned proceeding.[2]

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

I. INTRODUCTION AND SUMMARY

Parties commenting in this proceeding have submitted various approaches for responding to the proposals in the Notice. CTIA and a large number of commenters support the FCC's effort to "simplify and streamline the contribution process for carriers." However, several other parties have asked the Commission to take regulatory actions that may have the opposite effect and may result in additional burdens on carriers and the Commission.

First, the Commission should not eliminate the interim safe harbor that allows CMRS carriers to reasonably approximate the percentage of interstate telecommunications revenues that they generate nor should the Commission raise the safe harbor percentage. None of the parties requesting such changes submit any quantitative information or analysis that justify eliminating the interim safe harbor at this time or support the suggestion that the contribution percentage should be raised.[3]

Second, the Commission should reject the arguments of those suggesting to limit or eliminate the ability of carriers to recover USF contributions from end users. Those parties argue that allowing carriers flexibility in their approach for recovering their USF contributions leads to customer confusion and carrier abuse. However, in the Truth-in-Billing proceeding, the Commission put in place procedures and guidelines to respond to deceptive and misleading billing practices and has decided to afford carriers freedom to respond to consumer and market

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2 Federal-State Joint Board on Universal Service, et. al., CC Docket Nos. 96-45, 98-171, 90-571, 92-237 and NSD File No. L-00-72, and CC Docket Nos. 99-200 and 95-116, *Notice of Proposed Rulemaking*, FCC 01-145 (rel. May 8, 2001) ("Notice").

3 See WorldCom Comments at 12; Ad Hoc Telecommunications Users Committee ("ATUC") Comments at 30-32 (advocating that the Commission require CMRS providers to contribute to the USF on a flat per-line basis); National Telephone Cooperative Association ("NTCA") Comments at 4; National Exchange Carrier Association ("NECA") Comments at 8.

forces individually in dealing with cost recovery.[4] Moreover, even if a few carriers have or continue to commit abuses in their contribution recovery, a blanket ban on end-user recovery is not an appropriate response, absent evidence that the market will not appropriately react to inflated end-user charges and abuses. Rather, the Commission should enforce its rules against violators. Particularly for CMRS carriers, the Commission should heed to its recognition that because the CMRS industry is not rate regulated, there is no need to regulate its cost recovery.

II. THERE IS NOTHING IN THE RECORD TO SUPPORT ELIMINATING THE SAFE HARBOR FOR CMRS CONTRIBUTIONS.

Several parties commented upon the Commission's statements about the possibility that the percentage of interstate wireless telecommunications revenues may exceed the present safe harbor percentage.[5] Taking what the Commission articulated as a "hunch" and treating it as a truism, they ask the Commission to 1) eliminate the safe harbor altogether; 2) raise the current safe harbor percentage; or 3) reconsider whether and how the safe harbor applies. WorldCom, for example, restates the Commission's articulation that the CMRS industry has grown substantially and that, in general, wireless industry revenues exceed $52 billion.[6] Without adding more, WorldCom uses these blanket statements alone as justification for its "belief" that the percentage of interstate wireless telecommunications revenues indeed exceeds the

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4 See Truth-in-Billing and Billing Format, CC Docket No. 98-170, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492 (1999) ("Truth-in-Billing Order").

5 Notice ¶12.

6 See WorldCom Comments at 12.

Commission's interim safe harbor percentage.[7] It asks the Commission to eliminate the safe harbor entirely.

While not joining WorldCom's call to eliminate the safe harbor, NECA, the Iowa Utilities Board and NTCA asked the FCC to increase or reevaluate the safe harbor percentages for wireless carriers.[8] They too offer not a quantum of evidence to support their proposals. Nonetheless, they maintain that the wireless carriers' percentage of interstate traffic has increased because more people are using wireless phones for making long distance calls or are taking advantage of wireless bundled local and long distance "one rate" plans and claim the current safe harbor percentage is outdated.

These anecdotal claims cannot serve as the basis for the Commission abandoning the CMRS safe harbor or changing the methodology for calculating the percentage. Stated differently, there is no quantitative analysis in the record to support eliminating or adjusting upward the safe harbor. As CTIA explained in its comments, the Commission cannot eliminate the safe harbor or depart from the DEMs methodology used to set the safe harbor percentage without support in the record and reasoned analysis.[9] The Court of Appeals for the D.C. Circuit has further explained that an agency's explanation for a departure of a given policy requires more than a statement of preference.[10] The Commission cannot simply explain its decision to

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7 Id.

8 See NTCA Comments at 4; NECA Comments at 7; Iowa Utilities Board Comments at 2.

9 See CTIA Comments at 8 (citing Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 42 (1983); Greater Boston Television Corp. v. F.C.C, 444 F.2d 841, 852 (D.C.Cir.1970)).

10 See National Welfare Rights Organization v. Mathews, 533 F.2d 637, 648-49 (D.C. Cir. 1976) (holding that it was unreasonable for the Secretary of Health, Education and Welfare ("HEW") to determine that $1200 was a proper exemption for automobiles or

abandon or raise the safe harbor, but must present a set of facts rationally related to the end result. Thus far, the only support to eliminate or raise the safe harbor is baseless conjecture proposed by few parties. Clearly, this is insufficient.

The Commission should not be making moves to eliminate or raise the safe harbor percentage, but should, in fact, be going in the opposite direction. Considering that the Commission decided in the Safe Harbor Order that the safe harbor percentage ought to mirror the percentage created from the DEMs data, the Commission should reduce the percentage to the most recent data reported to the Commission by the National Exchange Carriers Association: to 13.25 percent. [11]

If the Commission ventured to depart from the current methodologies used to calculate the safe harbor percentage or eliminate the safe harbor entirely, it firsts needs to clarify how CMRS providers are to consider the interstate portion of their traffic. As the Commission previously has recognized and as continues to be the case today, wireless carriers cannot easily

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that $2250 was a proper limitation on family resources, without providing empirical data supporting these amounts, and finding that HEW "failed to articulate factual determinations underlying" the agency's decision). The court concluded that unless HEW provided a more precise articulation of findings and relevant factors, it would be "meaningless" for the court to even undertake a review of the amounts. Id. at 648-649. Furthermore, it noted that

> [t]he "basis and purpose" statement required by Section 4(c) of the APA must be sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted. In particular, the statement must advert to administrative determination of a factual sort to the extent required for a reviewing court to satisfy itself that none of the regulatory provisions were framed in an "arbitrary" or "capricious" manner. Id. at 648 (citing Amoco Oil Co. v. Environmental Protection Agency, 501 F.2d 722, 740-41 (1974)).

[11] See CTIA Comments at 6-8.

separate revenues along jurisdictional boundaries.[12] To change the safe harbor percentage and require all CMRS providers to conduct traffic studies to determine what percentage of wireless carriers' revenues is interstate, the Commission would first have to adopt standards for conducting such studies in order to ensure uniformity and prevent under or over reporting of revenues. For purposes of determining the jurisdictional nature of wireless calls simply to apportion revenues for universal service purposes, the Commission would need to determine:

- how to allocate the revenues from a mobile call that is completed in a jurisdiction other than the one in which it originated;
- mechanisms for carriers to respond to scenarios where the wireless network has not recognized that the mobile telephone unit has traveled to a new jurisdiction because a particular antenna may cover more than one state;
- how carriers should calculate revenues when a customer purchases flat-rate services including a specific number of bundled units, but have used only a portion of those total units; and
- how and whether to differentiate revenues generated from flat-rate services and those generated on a per-minutes of use basis of service.

As could be imagined, the process of changing the current safe harbor percentage would be quite an onerous undertaking that would result in unnecessary burdens on the FCC and wireless carriers. Rather than achieving its goal of streamlining and simplifying the universal service contribution process, the Commission would be instead imposing additional complex requirements on wireless services providers alone. Such a move violates the Commission's policies deregulating CMRS.[13]

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12 See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21252, ¶ 11 (1998) ("Safe Harbor Order").

13 See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and* Order, 9 FCC

As CTIA has explained in its comments, mobile wireless services do not easily fit into regulatory models designed primarily for wireline carriers. That is the reason the Commission appropriately acted to adapt its universal service contribution mechanism to the unique characteristics of CMRS carriers.[14] As CTIA fully explained in its initial comments, the reasons the FCC adopted the safe harbor still exist today.[15] Before acting on recommendations to reevaluate the current safe harbor percentages, the Commission should carefully consider the potential administrative burdens on the FCC to administer the process of changing the percentage or eliminating the safe harbor and the financial costs to CMRS carriers to submit traffic studies, especially when the Commission would be doing so in response to unsubstantiated anecdotal evidence.

III. LIMITING OR ELIMINATING CARRIERS' RECOVERY OF UNIVERSAL SERVICE CONTRIBUTIONS FROM END USERS IS NOT APPROPRIATE AT THIS TIME, ESPECIALLY FOR CMRS CARRIERS THAT ARE EXEMPT FROM RATE REGULATION.

Several parties responded to the Commission's proposal to "limit the flexibility previously afforded carriers in the recovery of universal service obligations."[16] These parties ask the Commission to forbid carriers from recovering their USF contributions from surcharges and line items altogether;[17] to limit the USF fees that carriers collect from their customers to the

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Rcd 1411, 1419 (1994) (stating that "CMRS providers will not find themselves confronted by a new set of burdensome regulatory requirements that might impede their provision of service or place them at a competitive disadvantage . . . .").

14 See Safe Harbor Order ¶¶ 11, 13.

15 See CTIA Comments at 4.

16 See Notice ¶ 42.

17 See West Virginia Consumer Advocate Comments at 5.

actual assessment factors established by the FCC;[18] or to establish a uniform description of this charge as the "Federal Universal Service Charge."[19] According to the comments, their push to restrain carriers' USF contribution recovery centers on a concern over customer confusion about line item descriptions and charges, and purported collection abuses.

In general, absent evidence that the flexible recovery policy the Commission adopted in the Truth-in-Billing Order[20] has resulted in egregious abuses and that the market has not responded adequately, it is not appropriate for the Commission to make any sweeping changes to that policy. In the Truth-in Billing Order, the Commission already has established procedures for addressing concerns over deceptive or misleading billing.[21] And where there is evidence of a few carriers exercising their market power to recover their USF contributions in a non-competitive manner, the answer is not to eliminate the flexibility for recovery altogether for all carriers, but to enforce more strictly the rules against violators. Moreover, the Commission's complaint procedures are sufficient to address complaints about carrier recovery abuses. The Commission should heed to its acknowledgment that the First Amendment protects against federal government censorship of legitimate commercial expressions,[22] especially when there are

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18 See Florida State University Comments at 2; ACUTA, Inc.: The Association for Telecommunications Professionals in Higher Education ("ACUTA") Comments at 2-3; Center for Digital Democracy, et. al. ("CDD") Comments at 6 (limiting this argument to dial around and prepaid card providers); ATUC Comments at 35.

19 See AT&T Wireless Services, Inc. Comments at 7 (also arguing that carriers should not have to incur costs of changing their billing systems to accommodate a uniform line name and that uniform labels alone cannot cure customer confusion); ACUTA Comments at 3; CDD Comments at 8; Cingular Wireless Comments at 10.

20 See Truth-in-Billing Order ¶ 55.

21 See id.

less intrusive mechanisms available for dealing with the stated governmental concern in a manner that would pass muster under the test for regulation of purely commercial speech.

Nonetheless, even if the Commission decides to alter its approach to carrier recovery, it should at least retain its policy of not regulating the CMRS industry. There is no support for straying from this policy and those parties that object to the current cost recovery guidelines neither specifically address the CMRS industry, nor put forth any reason for the Commission to stray from its policy of not mandating cost recovery mechanisms for carriers that are not subject to rate regulation.[23]

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22 Truth-in-Billing and Billing Format, CC Docket No. 98-170, *Notice of Proposed Rulemaking*, 13 FCC Rcd 18176, ¶ 15 (1998) ("restrictions on speech that ban truthful, non-misleading commercial speech about a lawful product cannot withstand scrutiny under the First Amendment") (citation omitted).

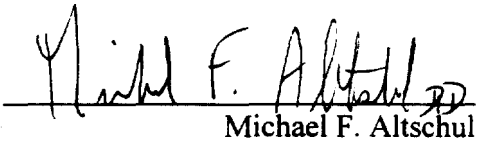
23 See generally Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, RM-8143, *Second Memorandum Opinion and Order*, 14 FCC Rcd 20850, ¶ 19 (1999); see also Telephone Number Portability, CC Docket No. 95-116, RM-8535, *Third Report and Order*, 13 FCC Rcd 11701, ¶ 136 (1998) (concluding that all carriers not subject to rate regulation may recover the costs of local number portability "in any lawful manner consistent with their obligations under the Communications Act").

IV. CONCLUSION

CTIA respectfully requests that the Commission adopt USF contribution and recovery rules in accordance with the recommendations made herein.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION



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